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In The

Supreme Court of the United States

October Term, 1997

W.P., *et al.*, Individually and as Representatives of a Class Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2),

Petitioners,

vs.

PETER VERNIERO, Attorney General of New Jersey, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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STATEMENT

Petitioners here seek review of the decision of the United States Court of Appeals for the Third Circuit holding that the retroactive application of New Jersey's sex offender community notification laws (hereinafter referred to as "Megan's Law") do not violate the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution. *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), Appendix B ("App. B") to Petition for a Writ of Certiorari (hereinafter "the Petition"). As is argued more fully in the Petition, such review is warranted for several reasons. First, the issue of whether community notification regarding sex offenders constitutes punishment is a question of extraordinary practical and doctrinal importance. Second, there is a split of authority in the lower courts with regard to whether community notification imposes punishment for purposes of the Double Jeopardy and Ex Post Facto Clauses.

Respondents contend that the petition should not be granted because the Court's decision, in *Hudson v. United States*, 118 S. Ct. 488 (1997), fully resolves the jurisprudential mystery regarding the proper test to determine whether a provision imposes punishment for purposes of the Ex Post Facto and Double Jeopardy Clauses. Respondents also argue that there is no conflict between the lower courts' decisions interpreting sex offender notification laws. For the reasons set forth below, petitioners respectfully submit that the Petition should be granted because the Court's decision in *Hudson* does not eviscerate either the practical or the doctrinal reasons why the Court should consider the constitutionality of the retroactive imposition of the many sex offender notification laws that are sweeping the nation. Furthermore, the Court's holding in *Hudson* heightens, rather than eliminates, the conflict between the lower courts' holdings regarding the constitutionality of these laws. Accordingly, certiorari should be granted and the case set for a plenary review.

FURTHER REASONS FOR GRANTING THE WRIT

I. The Court's Decision In *Hudson* Does Not Eviscerate The Doctrinal And Practical Reasons Why This Court Should Consider The Constitutionality Of Sex Offender Notification Laws.

A. The Court's Decision In *Hudson* Does Not Resolve The Issue Of What Test Should Be Applied To Determine Punishment Under The Ex Post Facto Clause.

This Court, in *Hudson*, decided that the proper test to be used to determine whether a civil proceeding constitutes Double Jeopardy under the United States Constitution is the analysis previously utilized by the Court in *United States v. Ward*, 448 U.S. 242, 248-49 (1980), employing the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Hudson*, 118 S. Ct. at 493. In so holding, the Court explicitly disavowed the analysis propounded in *United States v. Halper*, 490 U.S. 435, 448 (1989). *Hudson*, 118 S. Ct. at 494. In *Hudson*, as in *Halper* and *Ward*, however, the Court's decision only addressed the question of whether a sanction constitutes punishment under the Double Jeopardy Clause, U.S. CONST., amend. V, and did not comment on the appropriate test to be applied under the Ex Post Facto Clause, U.S. CONST., art. I § 10.

Although the court of appeals assumed that "punishment" has the same meaning under both clauses, App. B at 35a, this Court's position on the issue is much less clear. Indeed, in *United States v. Ursery*, 116 S. Ct. 2135, 2146 (1996), the Court expressly warned against lifting the punishment analysis under the Double Jeopardy Clause and applying it to another constitutional provision, explaining that each constitutional provision must be analyzed separately, in light of the significant differences between the purposes of each provision. *See id.* ("[T]he difference in approach [i]s based in a significant difference between the purposes of our

analysis under each constitutional provision."). The Court has consistently avoided broad, sweeping pronouncements of constitutional interpretation, and has instead reviewed various measures on a case-by-case basis and in light of the particular provision at issue. *Id.* at 2147; *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (declining to articulate a single "formula" for determining whether civil measure falls within the constitutional prohibition against punishment). For example, in *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994), the Court reviewed a tax proceeding under the Double Jeopardy Clause; in *Austin v. United States*, 509 U.S. 602 (1993), the Court analyzed civil forfeitures under the Excessive Fines Clause; and in *Ursery*, 116 S. Ct. at 2147, the Court dealt with *in rem* civil forfeitures under the Double Jeopardy Clause.[1]

The Court is now presented with another distinct civil measure — sex offender notification — and its constitutionality under both the Double Jeopardy and the Ex Post Facto Clauses. Because *Hudson* does not address the latter, it does not, given this Court's careful jurisprudence, fully resolve the question presented by this Petition. More fundamentally, however, because *Hudson* did not seek to resolve the question of the constitutionality of sex offender notification statutes in particular, it leaves open the question as to which the lower courts are split: may such statutes be retroactively applied? Certiorari should be granted to resolve this pressing issue.

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1. As noted in the Petition, in *Kansas v. Hendricks*, 117 S. Ct. 2072, 2081-86 (1997), the Court utilized the same analysis for the purposes of evaluating the constitutionality of a civil commitment statute under both the Double Jeopardy and Ex Post Facto Clauses. *See* Petition at 17 n.4. However, just as the Court's holding in *Ursery* was closely tied to the nature of the *in rem* forfeiture there at issue, *Ursery*, 116 S. Ct. at 2142-47, the Court's analysis in *Hendricks* was explicitly based upon the historical understanding of civil commitment. *Hendricks*, 117 S. Ct. at 2080-81. *See also Austin*, 509 U.S. at 606-18 (conducting in-depth historical analysis of *in rem* civil forfeitures to determine if statute violated Excessive Fines Clause).

B. Whether Community Notification Regarding Sex Offenders Constitutes Punishment Remains A Question Of Great Practical Importance, Which Should Be Addressed By This Court.

Respondents do not and cannot deny that this case implicates an issue of the greatest practical importance. As is detailed in the Petition, all fifty states and the federal government have now enacted sex offender registration statutes. *See* Petition at 12-14 & 12 n.3. Given the split of authority as to the constitutionality of these particular provisions, a split that survives this Court's decision in *Hudson*, *see infra* at II, each of these jurisdictions, and the tens of thousands of individuals subjected to these laws, anxiously await the Court's resolution of this critical constitutional and pressing issue. Certiorari must be granted in order to achieve this resolution.

II. The Court's Decision In *Hudson* Heightens Rather Than Eliminates The Conflict Between The Lower Courts Which Have Addressed The Constitutionality Of Sex Offender Notification Provisions.

Respondents assert that there exists no conflict between the decisions of the lower courts as to the constitutionality of retroactive imposition of sex offender notification statutes. Even if this were true, as petitioners submit it is not, this Court's decision in *Hudson* requires that an analysis be utilized which has resulted in lower courts reaching opposite conclusions as to this question. In *Kansas v. Myers*, 923 P.2d 1024, 1043 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997), the Supreme Court of Kansas held that the application of the *Mendoza-Martinez* factors, as is now required by *Hudson*, supported the conclusion that the public disclosure provisions of the Kansas Sex Offender Registration Act could not be constitutionally imposed retroactively. Indeed, the Kansas court specifically looked to three of the *Mendoza-Martinez* factors — that the statute placed an affirmative disability or restraint on the registrants, that unlimited public access provided a deterrent and retributive

effect, and that the extent to which the information was available to the public was excessive — in concluding that the Kansas law violated the Ex Post Facto Clause because it made "more burdensome the punishment for a crime after its commission." *Id.*

Similarly, the United States District Court for the District of New Jersey, in *Artway v. Attorney General of N.J.*, 876 F. Supp. 666, 688-92 (D. N.J. 1995), *aff'd in part & vacated in part*, 81 F.3d 1235 (3d Cir. 1996), expressly relied upon the *Mendoza-Martinez* test in holding Megan's Law unconstitutional. On appeal, the Third Circuit rejected the district court's legal analysis, adopting instead the three-pronged test derived from this Court's previous decisions in *Halper*, *Austin*, and *Kurth Ranch*. *Artway v. Attorney General of N.J.*, 81 F.3d 1235, 1263 (3d Cir. 1996). This newly synthesized test was then used by the *E.B.* court to uphold the retroactive application of the notification provisions of the statute. *See E.B.*, App. B at 35a-37a.

By contrast, the Second Circuit, in *Doe v. Pataki*, 120 F.3d 1263, 1275, 1284 (2d Cir. 1997), used the *Mendoza-Martinez* factors, but concluded that the notification provisions did not constitute punishment for purposes of the Ex Post Facto Clause. Similarly, in *Russell v. Gregoire*, 124 F.3d 1079, 1087-93 (9th Cir. 1997), the Ninth Circuit applied the *Mendoza-Martinez* factors in holding that the possible effects of notification were not so punitive as to render the law unconstitutional.

It is evident, therefore, that the test adopted by the Court in *Hudson* has resulted, and will continue to result, in conflicting conclusions as to the constitutionality of the retroactive imposition of sex offender notification statutes, and even as to the particular factors most helpful to that analysis. *Compare Myers*, 923 P.2d at 1043 (focusing on only three of the *Mendoza-Martinez* factors: affirmative disability or restraint, deterrent and retributive effect, and excessiveness) *with Russell*, 124 F.3d at 1091-92 (explicitly discussing three different *Mendoza-Martinez* factors: similarity to

the goals of criminal punishment, affirmative disability and restraint, and historical analogies). Far from resolving the conflict cited in the Petition, then, *Hudson* exacerbates it, by prescribing an analysis that has already resulted in lower courts reaching opposite results in relation to identical or nearly identical statutory provisions. Certiorari must be granted to resolve this significant conflict.

Nor, as respondents contend, may the conflict be avoided based upon the factual dissimilarities between the Kansas Sex Offender Registration Act and New Jersey's Megan's Law. To the contrary, as is discussed at length in the Petition, if anything, the practical difference between the notification provisions of the Kansas statute and the New Jersey law illustrate that Megan's Law is far more punitive, and thus, more susceptible to the constitutional challenge brought here. *See* Petition at 25-26.

Specifically, while the Kansas court rested its conclusion of unconstitutionality in part upon the unlimited nature of the access afforded the public to sex offender information, *Myers*, 923 P.2d at 1031, the New Jersey law affirmatively disseminates such information to organizations and residents. *E.B.*, App. B at 10a-11a. The *Myers* Court acknowledged this difference between the laws, *Myers*, 923 P.2d at 1041, but reasoned that the repercussions of notification, *i.e.*, stigma and ostracism, were "great enough under the facts of this case to be considered punishment." *Id.* at 1043. However, these same repercussions, and worse, have consistently been recognized as consequences suffered by individuals subject to the notification provisions of Megan's Law. *See E.B.*, App. B at 71a ("Notification puts the registrant's livelihood, domestic tranquillity, and personal relationships with all around him in grave jeopardy."); *Artway*, 81 F.3d at 1266 ("In addition to the ostracism that is part of its very design, notification subjects [sex offenders] to possible vigilante reprisals and loss of employment."); *Doe v. Poritz*, 662 A.2d 367, 439 (N.J. 1995) (Stein, J., dissenting) ("[O]ne reasonably could anticipate that the notice of the presence of a sex offender will trigger fear, suspicion, hostility, anger, evasive

behavior, ostracism, and in some cases derision, epithets and violence.").

Moreover, those courts that have interpreted Megan's Law have not viewed it as more limited than the Kansas statute, but rather as broader than provisions which allow more public access to an individual's criminal history, *see Artway*, 876 F. Supp. at 689 (stating that public notification under Megan's law goes well beyond provisions which allow public access to an individual's criminal history), and, indeed, as the most "far-reaching" of any such statute. *See Doe v. Poritz*, 662 A.2d at 422 (Megan's Law "sail[s] on truly uncharted waters, for no other state has adopted such a far-reaching statute."). *See also id.* at 428 (Stein, J. dissenting) ("[N]one of the states with retroactive notice provisions provides for notification as extensive as that mandated by New Jersey's statute.").

In sum, the distinction made by respondents between Megan's Law and the Kansas statute in no way eviscerates the very real conflict between the holdings of the courts. Indeed, as discussed above, that conflict, after *Hudson*, is sharper than ever. Accordingly, the petition should be granted.

III. If The Court Determines Not To Resolve This Issue On The Merits, The Court Should Grant The Petition, Vacate The Decision Of The Court Of Appeals, And Remand The Matter For Reconsideration In Light Of The Decision In *Hudson*.

Petitioners respectfully but strenuously urge the Court to grant this Petition in order to bring finality to the important constitutional and practical challenges that Megan's Law and its successor statutes have spawned. In the event, however, that the Court decides not to review the instant matter on the merits, the Court should grant the petition, vacate the judgment of the Third Circuit, and remand the matter for reconsideration ("GVR") in light of this Court's decision in *Hudson*. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995) (granting GVR in light of *Allied-Bruce Terminex*

Cos., Inc. v. Dobson, 513 U.S. 265 (1995)); *Chassin v. NYSA-ILA Med. & Clinical Servs. Fund*, 514 U.S. 1094 (1995) (ordering GVR in light of *New York State Conference of Blue Cross & Blue Shield Plans v. Travellers Ins. Co.*, 514 U.S. 645 (1995)). "Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . appropriate." *Lords Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, 117 S. Ct. 1731, 1732 (1997) (quotation omitted).

Respondents' argument to the contrary notwithstanding, the court of appeals did not employ the test prescribed by *Hudson* in this case. *See* Brief of Respondents in Opposition to the Petition for a Writ of Certiorari at 7. Rather, the court, having previously rejected the use of the *Mendoza-Martinez* factors in *Artway*, 81 F.3d at 1262 ("[T]he Supreme Court has made it clear that the *Mendoza-Martinez* test is not controlling for the issues in this case."), relied upon a test "divined" from a jurisprudence which this Court has now rejected. *See E.B.*, App. B at 36a (citing *Artway*, 81 F.3d at 1254-63 (stating "*Halper* thus contributes an important element to our analysis")). Because the court of appeals did not have the benefit of that rejection when it determined this matter, and because the only court to have considered Megan's Law using the analysis now prescribed by the Court has found the statute unconstitutional, *see Artway*, 876 F. Supp. at 692, at the very least, petitioners' claims should be remanded to be reviewed under the correct standard, as determined by this Court in *Hudson*.[2]

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2. Respondents argue that the court below used the proper test to decide that the retroactive application of the notification provisions of Megan's Law are constitutional. A review of the court's analysis, as well as respondents' brief, illustrates that this is not the (Cont'd)

(Cont'd)
case. In *E.B.*, the court of appeals employed the test that it had previously divined in its *Artway* decision. *E.B.*, App. B at 36a. The *Artway* court expressly relied on the standard set forth in *Halper*, *Artway*, 81 F.3d at 1256, and specifically rejected the application of the *Mendoza-Martinez* factors, *id.* at 1262, which the Court has now held should govern this analysis. While petitioners acknowledge that the considerations in the Third Circuit's test overlap some of the factors listed in *Mendoza-Martinez*, not all of the factors are taken into consideration by the court of appeals. For example, the Third Circuit did not evaluate the relation of the notification to a sex offender's criminal activity. Nor did the court of appeals fully analyze the similarly between notification and the traditional goals of criminal law. Moreover, the Third Circuit's three-part test necessarily puts emphasis on certain factors, which this Court has stated should be part of a more balanced analysis. *See Hudson*, 118 S. Ct. at 493. Accordingly, at the very least, the Court should issue a GVR order and permit the lower court to review petitioners' constitutional claims under the standard defined in *Hudson*.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, petitioners respectfully request that the Court grant the writ and reverse the decision of the court below.

Respectfully submitted,

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